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March 13, 2017

VIA ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: ***Channel Sharing by Full Power and Class A Stations Outside the Broadcast Television Spectrum Incentive Auction Context,*** **MB Docket No. 15-137;** ***Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions,*** **GN Docket No. 12-268;** ***Amendment of Parts 73 and 74 of the Commission's Rules to Establish Rules for Digital Low Power Television and Television Translator Stations,*** **MB Docket No. 03-185**

Dear Ms. Dortch:

On March 9, 2017, the undersigned and Matthew Murchison of Latham & Watkins LLP, along with Rick Chessen, Michael Schooler, and Diane Burstein of NCTA – The Internet & Television Association ("NCTA"), met with Brendan Carr, Acting General Counsel of the Commission, Bill Scher and Jake Lewis of the Office of General Counsel, and David Konczal of the Media Bureau regarding the above-referenced proceedings. On the same day, Mr. Chessen, Mr. Schooler, and Ms. Burstein met with Robin Colwell, Chief of Staff to Commissioner O'Rielly, regarding the same matters.

At these meetings, we began by explaining that the draft Order contains various assertions with which NCTA respectfully disagrees,[1] and by pointing out that the draft item appears to understate the potential carriage burdens presented by post-auction channel sharing, particularly with respect to low-power stations. But wholly apart from these problems with the proposed rules, we noted that the proposed Order's language in footnotes 54 and 71 is flawed and mischaracterizes what the Supreme Court decided in the *Turner* cases.

First, footnote 54 wrongly suggests that the Court's refusal to apply "strict scrutiny" to must-carry requirements depended *solely* on its finding that the requirements were "content neutral." In fact, the Court *also* found it necessary to distinguish the must-carry regime's

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1 *See* Comments of NCTA, GN Docket No. 12-268, MB Docket No. 15-137, at 3-10 (filed Aug. 13, 2015).

imposition of forced speech mandates on cable operators from cases applying strict scrutiny to forced speech by newspapers.[2] It did so by pointing to a cable operator's "bottleneck, or gatekeeper, control over most (if not all) of the television programming that is channeled into the subscriber's home."[3]

We also pointed out that footnote 54 directly contradicts Commission precedent when it suggests that "changes in cable market share" have not "eroded the justification for regulations that may impact speech." In the *2012 Viewability Sunset Order*, the Commission eliminated its "viewability" requirement in the must-carry context in part because it was "persuaded by cable commenters' argument that the dramatic changes in technology and the marketplace over the past five years render less certain the constitutional foundation for an inflexible rule compelling carriage of broadcast signals in both digital and analog formats."[4] Chairman Pai himself has made the point that significant changes in the video distribution marketplace since the *Turner* decisions have eroded the justification for invasive cable carriage mandates.[5]

Second, even if "intermediate scrutiny" remains the appropriate standard, must-carry requirements cannot survive unless they continue to further an important government interest—and footnote 71 disputes the argument that the Spectrum Act's open-ended offer to broadcasters to relinquish their spectrum undermines the conclusion that the government retains an important

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2 *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 656 (1994) ("*Turner I*").

3 *Id.*

4 *Carriage of Digital Television Broadcast Signals: Amendments to Part 76 of the Commission's Rules*, Fifth Report and Order, 27 FCC Rcd 6529 ¶ 11 (2012); *see also Agape Church, Inc. v. FCC*, 738 F.3d 397, 413 (D.C. Cir. 2013) (Kavanaugh, J., concurring) (explaining, in concurring with the court's decision to uphold the Commission's sunset of the "viewability" requirement, that "[t]he dramatically changed marketplace that the Commission aptly recognized in this case undermines the constitutional foundation of the Viewability Rule and, indeed, of the broader must-carry regime as well").

5 *See, e.g.*, Statement of Commissioner Ajit Pai on the D.C. Circuit's Decision in Comcast v. FCC, May 28, 2013, *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-321221A1.pdf ("I hope that the Commission will heed the lesson of today's D.C. Circuit decision and refrain from attempting to micromanage cable operators' programming decisions. Given the current state of the video marketplace, I agree with Judge Kavanaugh that 'the FCC cannot tell Comcast how to exercise its editorial discretion about what networks to carry any more than the Government can tell Amazon or Politics and Prose or Barnes & Noble what books to sell; or tell the *Wall Street Journal* or *Politico* or the *Drudge Report* what columns to carry; or tell the MLB Network or ESPN or CBS what games to show; or tell *SCOTUSblog* or *How Appealing* or *The Volokh Conspiracy* what legal briefs to feature.").

or substantial interest in preserving the current level of over-the-air broadcasting.[6] The Court in *Turner II* found—based on the congressional record in 1992—that the must-carry statute furthered an important government interest in "prevent[ing] *any* significant reduction in the multiplicity of broadcast programming sources available to noncable households."[7] Whatever else can be said about the Spectrum Act, it clearly did *not* evince such an interest in keeping the current level of over-the-air broadcasting intact. To the contrary, the Spectrum Act directly undermined that interest by allowing—and indeed encouraging—stations to turn in their over-the-air broadcast spectrum.

Respectfully submitted,

/s/ Matthew A. Brill

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cc: Brendan Carr
Robin Colwell
David Konczal
Jake Lewis
Bill Scher

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6 *See* Attachment to FCC Fact Sheet, *Channel Sharing by Stations Outside the Broadcast Television Spectrum Incentive Auction Context*, GN Docket No. 12-268, MB Docket Nos. 03-185 and 15-137, ¶ 20 n.71 (rel. Mar. 2, 2017).

7 *Turner Broad. Sys. v. FCC*, 520 U.S. 180, 193 (1997) ("*Turner II*") (emphasis added).